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MEMOIR

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HON. CHARLES DOE

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MEMOIR

OF

HON. CHARLES DOE,

LATE CHIEF JUSTICE

OF

THE SUPREME COURT OF NEW HAMPSHIRE.

BY

JEREMIAH SMITH.

Read before the Southern New Hampshire Bar Association,
at Manchester,

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MEMOIR OF CHARLES DOE.

BY JEREMIAH SMITH, OF CAMBRIDGE, MASS.

At the law term of the Supreme Court, held a few days after the death of Chief Justice Doe, honor was done to his memory by addresses from various members of the bar and of the bench; and those addresses have since been published as an appendix to the proceedings of the last annual meeting of this Association. The appropriate and touching remarks made on that occasion pay ample tribute to the merits of our departed friend; and, taken together, constitute an admirable summary of the salient points of his judicial career. But it did not fall within the province of any one speaker on that occasion to give a connected memoir of his entire life; and hence it has seemed desirable to the officers of this Association that such a memoir should now be laid before you.

Charles Doe, the late chief justice of New Hampshire, was the youngest child of Joseph and Mary Bodwell (Ricker) Doe. He was born at Derry, N. H., April 11, 1830. Early in his childhood, the family returned to their former residence in Somersworth (now Rollinsford), N. H., and took up their abode in the old homestead of the Ricker family. He was fortunate in his parentage. His mother was of a substantial New England family, the daughter of one of the leading citizens in that community, and the sister of Captain Ricker, whose gallant exploit in rescuing his vessel from French captors is narrated in Smith's N. H. Reports, *p.* 432–3. His father was a man of remarkable natural ability. Like his son, he had all his resources at command. In the New Hampshire legislature, he distin-

guished himself in a running debate with the then king of the state, Isaac Hill. The late Daniel M. Christie, at that time, I believe, one of the younger members, used to give a vivid description of the controversy. Governor Hill was, of course, one of the ablest men of his generation: but he was, both by nature and habit, a writer rather than a speaker, and was accustomed to read his views to the house from manuscript. Mr. Doe would instantly rise and make a full oral reply. Governor Hill could not trust himself to rejoin by word of mouth, but had to wait until he could go home, write another speech, and bring it in next day. Then, as on the previous day, as soon as the reading was finished, the member from Somersworth would immediately make a pungent off-hand answer. Mr. Doe had not only the mental alertness afterwards so conspicuous in his son, but, like him, he also had the courage of his convictions. As a member of the Board of Trustees of a Savings Bank, he earnestly opposed a proposition to risk the money of the depositors by taking stock in a new railroad, which it was hoped would benefit the community, though it might not enrich the stock-holders. When the majority outvoted him, he wrote out, and signed, upon the records of the board, a vigorous protest. The result of the investment was a total loss. His son's judicial action many years later, in the case of *Fisher* v. *Concord R. R.*, 50 N. H. 200, *p.* 204–206, was probably not uninfluenced by the father's conduct on this occasion, which he always remembered with great satisfaction.

Charles Doe attended the academies at South Berwick, Exeter, and Andover. He spent one term at Harvard, and then entered Dartmouth college, where he graduated in 1849 in the same class with his future colleague, Clinton W. Stanley. In college, he was not a diligent student. "Stanley and I," said he, "competed for the foot of the class, and I beat Stanley." He not only failed to study the prescribed text-books, but he did not even own some of them.

From the moment of his graduation, however, he began a life of hard work. He soon entered the office of Daniel M. Christie, of Dover, and applied himself diligently to the study of law. Perhaps no office in the state has turned out more men who afterwards achieved professional success. At one time, three out of the six judges of the Supreme Court were old pupils of Mr. Christie's. Among his earlier students were Chief Justice Perley, and United States Senator John P. Hale. Like most eminent lawyers in active practice, the head of the office had very little time in which to direct the studies of his clerks; but they got a great deal from him indirectly. He was a man saturated with legal learning; and a large amount of valuable matter gradually oozed out from him, and exercised a fertilizing influence upon the young men around him. Then, as now, it was a usual mistake of law students to do too much reading and too little thinking. Into this error Judge Doe did not fall. Before his admission to the bar he read fewer text-books than most students. If my memory of his statement is correct, he read not more than three, or, at the outside, four text-books, in addition to Kent's Commentaries. But these books he made his own. Meantime he gave careful attention to the business passing through the office, learning how to look up authorities, and how to handle reported decisions. At the close of his office pupilage he further pursued his studies at the Harvard Law School. Among his contemporaries at that institution were an unusual number of men who have since attained legal eminence.

In January, 1854, he commenced practice at Dover, where he continued until his appointment to the bench, having the late Charles W. Woodman as his partner for much of the time. At the very outset of his career he received the appointment of county solicitor; which, by the way, was not conferred without some hesitation on the part of the governor, due to the youth and inexperience of the candidate. This appointment, which he held for two and a half

years, operated as an immediate introduction to court work; and he came at once to the front, becoming *per saltum* one of the prominent members of the Strafford bar. The first time he appeared in court was when he opened the case of *State* v. *Hodge*, a prosecution for murder in the first degree. Besides the criminal business of the state, he had a fair share of civil business, trying cases with success against such opponents as Daniel M. Christie, and John P. Hale. Probably his most important civil litigation was that locally known as "The Kingman Case," where he was at first the junior of Ira Perley, and subsequently (after Judge Perley's reappointment to the bench) of John S. Wells. Few civil controversies have ever excited greater public interest in Strafford county; but as the trial on the merits took place before a board of referees whose decision was final, it does not figure in the reports except as to some questions arising in the preliminary stages of the litigation. (See 31 N. H., 171 and 182.) The practice of the young lawyer was not confined to the Trial Terms. He argued cases orally at the Law Term, and was listened to there with marked attention.

In certain respects he departed entirely from the prevalent method of trying jury cases. The wide license in cross-examination formerly allowed to Mason and his compeers, to enable them to break down a class of professional witnesses, was an evil still in full force; and so was the practice of interchanging asperities between counsel. With the exception of the late Charles H. Bell, no man in that part of the state did so much to break up these practices as the young Charles Doe; and he, like Governor Bell, accomplished this end by the force of his own example. He treated the witnesses of the other side with civility; and refrained from "spats" with the opposing counsel. When Theophilus Parsons became chief justice of Massachusetts, and insisted on stopping Samuel Dexter from making an argument not warranted by the evidence, the learned counsel retorted, "Your

Honor did not argue your own cases in the way you require us to." "Certainly not," was the reply, "but that was the judge's fault, not mine." Such a dialogue could not have taken place in the case of Judge Doe. The limits which he, as a judge, afterwards laid down for counsel, were the same which he himself had carefully observed when at the bar. His rejection of the old methods was strongly marked in the first trial in which he took part, the capital case already mentioned. The senior counsel for the defense was a man (now almost entirely forgotten) who had gained distinction in what may be called the blackguarding method of trying cases. Better men had essayed to fight him with his own weapons, and had failed for the very reason that they *were* better men. It did not seem to have occurred to the bar that there was any way of meeting him except by descending to his level and attempting to pay him back in his own coin. This man began the Hodge trial in his accustomed way, intending, no doubt, to stir up and confuse the young junior counsel for the state. To the intense surprise of the spectators, the new solicitor ignored the existence of the senior counsel for the defense. He did not seem to hear any of his irrelevant remarks, but went on putting questions and addressing the court just as if those remarks had never been made. The consequence was that, ere the end of the long trial, the counsel for the defense had "flattened out" as never before.

Probably the pleasantest recollection of Judge Doe's early professional life was his association with a very remarkable student in his office—the late Thomas A. Henderson, of Dover, a graduate of Bowdoin in 1855, and of the Harvard Law School in 1861; who, at the conclusion of his legal studies, entered the Union Army, and died upon the battle-field in 1864, when Lieutenant-colonel of the Seventh New Hampshire Volunteers. For this unusually gifted young man Judge Doe entertained the warmest regard, and I doubt whether he ever met any one whom

he considered the intellectual superior of Colonel Henderson.

Charles Doe, though loving the law for its own sake, was not wholly absorbed in the practice of his profession. He entered earnestly into politics. His father was one of the old war-horses of the Democracy, and the son naturally attached himself to the same party. He was Assistant Clerk of the State Senate in 1853 and 1854; and was active as a stump speaker in the exciting campaigns which followed the repeal of the Missouri Compromise.

All this time, however, he was looking forward to a legal future, rather than to political distinction. Stump speaking was taken up to overcome the extreme bashfulness of his early years. He afterwards said that his motive in making political speeches was to harden himself, so that he could address a jury without having his knees knock together. But, when once embarked in active political work, he displayed there, as everywhere else, "the intense energy of his nature"; and was generally reckoned a strong "party man." Whatever other faults may have been laid to his account, no one has ever charged him with the defect which the apostle imputed to the church of the Laodiceans. Whichever view he espoused on any controverted question, he was wont to espouse it heartily. In those days there were immense land-slides from the Democratic ranks. From 1853 to 1858, it is safe to say that from five to ten thousand New Hampshire voters left that party. But Charles Doe not only remained in the ranks, but earnestly advocated the Democratic principles from the rostrum. He did not flinch when it was proposed to make him a political martyr by removing him from the office of county solicitor, which was done in 1856 by the governor upon an address by the legislature (then the common method of turning political opponents out of office). Apparently nothing could shake his devotion to the Democratic party. Great, then, was the surprise when it began

to be rumored in December, 1858, or January, 1859, that he was about to take the stump for the Republicans, and immense was the sensation when, early in 1859, he verified the rumor. Republicans, while eagerly welcoming such a powerful recruit, could not sometimes refrain from expressing their wonder, not that he should have left the Democratic party, but that he should have left it at that particular moment, when few other men were doing the same thing, save those who had previously expressed dissatisfaction, and when there was no such immediate provocation as at some past elections. If a man had not been driven out of the party by the passage of the Nebraska bill in 1854, by the Kansas troubles in 1856, by the Dred Scott decision in 1857, or by the Lecompton bill in 1858, why should he bolt in the year 1859, when no new grievance was in the air?

Twenty years later Judge Doe told me what the cause was which principally impelled him to sever his party relations at that moment; adding that he believed he had never before told it to any one. And when I relate it, I think you will not only see that it explains his action, but you will also see that he could not have stated it publicly at that time without placing a near relation in a most uncomfortable position. In his Democratic speeches he had been accustomed to lay much stress on the importance of preserving the Union, and had undoubtedly exhorted his hearers to consent to all reasonable compromises looking to that end. He had also made great use of the passage in Washington's farewell address which contains a warning against the formation of geographical parties. The Republican debaters who occasionally met him did not succeed in making effective rejoinders to this line of argument. All this time he, of course, assumed that the old Union was still in existence, not merely in name but in fact. Suddenly he was led to doubt the truth of his premises. The actual state of feeling in the South was made known to him from

a source calculated to carry immediate conviction to his mind. The revelation came through one of his brothers who was settled in Virginia. Through the intercourse which he had at this time with that brother (either during a visit by Charles to Virginia, or during a visit by the Virginia brother to the old Northern home) the inside situation in the South became fully known to him. It was the information then received as to the prevailing Southern sentiment that induced him to make an immediate change in his party affiliations. He now realized what the answer was to his own speech about the danger of breaking up the Union, an answer which his former Republican opponents had failed to make. It was this: "There is no Union now. The old Union is gone. Nothing remains but a shell ready to fall to pieces at any moment." He made up his mind that it was useless to compromise any longer; believing, as I suppose, that nothing would be effectual short of complete surrender to the demands of the extreme Southern leaders, and that the logical deductions from Chief Justice Taney's opinion in the Dred Scott case indicated the terms upon which they would insist. He announced himself a Republican, made a series of powerful speeches devoted largely to a discussion of the far-reaching effect of Chief Justice Taney's opinion, and gave no more thought to the possibility of compromise. When the Virginian brother, two years later, just before the firing on Sumter, wrote to Charles, imploring him to do his utmost to prevent the threatened breach, he replied that, so far from making any attempt in that direction, he believed that the sooner the trouble came, the better; it was inevitable, and it was best to have it at once and have it over with.

I have dwelt upon Judge Doe's change of political affiliation, not merely because it was an important crisis in his life, but also because it placed serious obstacles in the way of his success upon the bench, to which he was soon after

appointed. The political thermometer was then up to fever heat. Notwithstanding the fact that the issues were constantly changing, notwithstanding the fact that in the years from 1845 to 1861 an enormous number of good citizens changed their political allegiance, yet a large proportion of those who remained within the party organization were inclined to doubt the motives of all who quitted it, and were accustomed to regard them as little better than traitors. Looking back now at the situation, it seems almost incredible that such a feeling should have existed, but it certainly did exist and was calculated to produce very uncomfortable results. In the light of history, we can now respect alike the motives of those who adhered to the old party and of those who left it; but in those troublous times, toleration and charity were virtues not conspicuously practised by any political organization.

September 23, 1859, Charles Doe was appointed an associate justice of the supreme judicial court. Undoubtedly, some influential men favored his promotion on political grounds, but his legal qualifications were beyond dispute, and the two foremost lawyers of his section, Daniel M. Christie and Gilman Marston, both strongly recommended the appointment. The new judge was only twenty-nine years of age, but youth was not regarded as an objection to a judicial appointment in New Hampshire so much as it might have been in some other jurisdictions. The promotion of comparatively young men to the bench was not then uncommon in this state. From 1817 to 1867, six lawyers were appointed to the highest court, of whom the eldest was only thirty-three, and the youngest twenty-seven.

Judge Doe's official tenure was almost unique. Appointed at twenty-nine, he continued on the bench, with the exception of the two years from 1874 to 1876, until his death, at the age of sixty-five, thus passing more than half his life in the discharge of judicial duties. That no man

could have enjoyed so lengthy a term unless his services had been, in the long run, acceptable, goes without saying. But at the beginning of his judicial career he met with violent and bitter opposition in certain sections of the state. At the start, there was a very strong political prejudice against him. This obstacle, if it had been the only one, he would soon have overcome by his immediate manifestation of ability and impartiality. But there were other causes of offense which alienated from him some lawyers who would naturally have been his closest friends. He was, from the very beginning, a reformer. He insisted on having cases tried civilly, expeditiously, and upon the merits. Some bar leaders were unwilling to change the habits of a lifetime at the bidding of a younger man. The result in certain counties was a somewhat stormy season, which would have induced the majority of new judges either to submit to the old regime or resign their office in despair. Not so with Judge Doe. He stood his ground and carried his main points. In his mode of dealing with refractory counsel, as in most other things, he was original.

Take, for instance, a scene in which one of the first lawyers of the state figured. When Judge Doe took his seat upon the bench he resolved that no counsel should ever, in his presence, be permitted to insult a witness, a resolution prompted by the recollection of the treatment to which he himself had been subjected when a witness at a time prior to his admission to the bar. In the very first year of his service, a prominent lawyer, a man of character, but accustomed to the old style of practice, began to cross-examine a witness in an objectionable manner. "Mr. ——," said the judge, "I do not suppose that you intend anything offensive to the witness, but your manner might be construed by others as indicating such an intention, and I suggest that you modify it." Mr. —— at once flared up, and replied that he should examine the witness in his own way. To his intense astonishment, the judge,

instead of committing him for contempt, a move for which he was probably prepared and which might have gained him some popular sympathy, turned to the witness and said, "Mr. Witness, you need not answer any more of Mr. ——'s questions, unless you choose, and if you do choose to answer, you may do it in your own way." Mr. —— did not care to persist and take his chance of being roundly cursed by the witness. He immediately abandoned the case and left the court room, swearing audibly as he went. I may add that the learned counsel afterwards resumed his former friendly relations with the judge; and that he wrote me years after (when the judge was out of health) to express the earnest hope that Judge Doe would not resign from the bench.

Judge Doe early resolved never to commit counsel for personal disrespect to himself. But unruly members of the bar soon learned that there were other effective methods of keeping them in check. When a prominent lawyer, while engaged in a trial, made an impertinent remark to the court, he was quietly told that, unless he retracted that remark, his client would have to get other counsel. Whereupon the learned gentleman undertook to explain that he had not intended to use the English language in its ordinary meaning.

In one or two counties, combinations were attempted to break up terms which Judge Doe was to hold, and these efforts were not entirely without success. In one county, a term which would naturally have lasted three weeks was ended in three days. In another county, it was whispered with bated breath, that the leader of the bar would decline to try cases when Judge Doe was presiding, a resolution which was not adhered to. But it was ultimately found impracticable to solidify the bar against the judge. The lawyers whose methods of practice were unobjectionable, and the younger men, who were candid observers, were not inclined to follow the lead of their soreheaded brethren.

There was no clashing between Judge Doe and bar leaders of the type of William P. Wheeler and Edmund L. Cushing. Then, too, it gradually dawned even on his most persistent opponents, that the jury were inclined to sympathize with the court, and that hence a lawyer who made himself offensive to the bench was likely to lose the verdict. In one of the stormiest trials over which Judge Doe ever presided, a trial during which he was obliged continually to restrain the counsel on one side, the jury formed the opinion that the judge thought the merits of the case were against the side he was so often constrained to check: and this view undoubtedly exerted great influence upon the verdict, which was against the troublesome counsellors. In fact, the jury drew a wrong inference, for I happen to know that the judge, if himself a juror, would have returned the opposite verdict.

The quality which, more than all things else, triumphantly carried Judge Doe through these early difficulties, was his astonishing readiness. He had all his faculties at instant command. He not only possessed unusual legal knowledge, but he had also the power of applying this knowledge to facts, and with lightning-like rapidity. He was never puzzled or confused. He was not only able speedily to arrive at a correct conclusion, but was also able instantly to explain his views in short, crisp sentences, which completely disposed of the matter in hand, and frequently caused everybody to wonder how there could ever have been any doubt about the result.

As in the case of some other eminent judges, the rapidity of his mental operations was sometimes too great for the comfort of slower men who were practicing before him. But gradually the bar and the bench came to understand each other. The lawyer realized that reasonable expedition was desirable; and the judge discovered that the majority of men were incapable of keeping up with his fastest gait. The result was, that the lawyers went as

rapidly as they could, and that the judge ceased to urge them to go faster.

In charging the jury, Judge Doe acted upon the maxim that the principal object of speaking is to make yourself understood. He once asked an associate: "Did you instruct the jury in the precise language set out in the reserved case?" "Yes," was the reply. "Well," returned Judge Doe, "it is all sound law, and would have been admirable for an essay in a law review; but the jury could not have got any idea from it." "You do not," said he, "want to use legal phraseology to the jury. In charging them, you should translate the law into farmers' and mechanics' talk." In an important case in Cheshire county, where Caleb Cushing was counsel, there was an issue as to mental capacity, in respect to which both sides requested very fine-spun instructions. After hearing their suggestions, the judge said: "I am going to tell the jury that if this man knew what he was about, the transaction will stand; and, if he did n't, it won't." A look of unutterable disgust came over General Cushing's intellectual countenance, but neither party excepted. Whenever Judge Doe thought that justice required it, he did not confine himself to charging on the law, but also summed up on the facts; and if he was of opinion that one side had a weaker case than the other, he did not feel bound to conceal that opinion from the jury. A charge of his in a criminal case is probably one of the shortest ever given: "Gentlemen of the jury, I should n't want to convict the prisoner on this evidence, but you can do as you like."

While Judge Doe was not very firmly bound by precedent in civil cases, yet it was on the criminal side of the court that he departed furthest from the old rules of procedure. Knowing that the state cannot carry up exceptions, he sometimes struck out an entirely new path. Before the passage of the Statute of 1869, making respondents competent to testify in their own behalf, it was very

common for counsel representing the accused to complain bitterly of the fact that their clients' lips were sealed; and to assert that, if they could only have the privilege of testifying, they could satisfactorily explain all incriminating circumstances. Judge Doe had probably got very tired of hearing this sort of talk in cases where there was no reasonable doubt of guilt. One day, when a lawyer opening for the defense was making these stereotyped assertions, he was suddenly interrupted from the bench. "Mr. ——, you may put your clients on the stand." "What, your Honor?" "You will be permitted to call your clients as witnesses on their own behalf." The learned counsel, gradually recovering from his astonishment, turned, and whispered to his junior: "Well, John, we shall have to put the rascals on, and the result will be a conviction."

Judge Doe did not confine himself to *trying* criminal cases. He sometimes investigated the preliminary question whether they ought to be tried; and, if he came to a negative conclusion, practically coerced the state's counsel into entering a *nol pros.*, or accepting a plea that the respondent was guilty of a minor offense. If the state's counsel declined to accede to his view, he would sometimes, as a last resort, bluntly refuse to try the case. One of the most conspicuous instances of this was in the matter known in Grafton county as "the Haverhill school-house case," in which captious critics alleged that the judge "referred a criminal case, and appointed the witnesses." Judge Doe's own account of the matter was substantially as follows: A certain school district had an old and unfit school-house. The solid men of the district wanted to build a new one; but the poll-tax payers, for some peculiar reason, objected, and voted down the proposal. Thereupon, the minority, in broad daylight, assembled together, and tore down the old building. The result was, that the other faction got them indicted for a riot. The accused persons said that they were perfectly willing to bear the entire expense of build-

ing a new school-house in place of the one destroyed; but that they would not plead guilty to a charge of riot. Much excitement prevailed in the neighborhood, and it seemed probable that attempted trials would result in repeated disagreements of the jury. Meantime, the district was without a school, and the children were growing up in ignorance. Judge Doe, after satisfying himself of the nature of the case, denied the motion of the state for a trial, and made an order substantially as follows:

This case is not to be tried at the present term. Within thirty (?) days after the expiration of the term, Mr. William H. Cummings, of Lisbon, is to go upon the ground, and there hear A tell the story of one side, and B tell the story of the other side. Mr. Cummings is then to determine what sum each of the respondents ought to pay towards the erection of a new school-house. If the sums so assessed are paid, and the school-house is built, before the next term, then this case is not to be brought forward on the docket, but is to be regarded as dismissed.

Before the next term, the hearing had been had, the assessment made, the money collected, and the school-house built; but the voice of the prosecutors was still for war. They moved that the previous order should be rescinded, and the case set for trial. The term was held by Judge Nesmith, whose racy Scotch-Irish humor many of us vividly remember. The motion was argued at great length in the old court-house at Haverhill Corner. When the learned counsel at last stopped (probably from sheer physical exhaustion), Judge Nesmith held up the sheet of paper upon which the offensive order was written, and said: "There does not seem to be anything immoral in this order. Indeed, it appears to have been made in the interest of the cause of education. If I were to rescind it, I should be saying that I was a bigger man than Judge Doe. In short, gentlemen, I wash my hands of the whole matter."

The audience burst out laughing, and this was the end of "the Haverhill school-house case."

During the first seven years of his judicial life, Judge Doe was not conspicuously prominent in Law Term work; and his appearances in the reports were less frequent than those of most of his colleagues. (Each judge had then some discretionary power as to which of his opinions should be reported.) Judge Doe's earliest opinions appear in Vol. 39. In the eight volumes from 39 to 46, his opinions average less than eight pages per volume, and of these only two (*Underhill* v. *Manchester*, 45 N. H. 214, and *Fifield* v. *Northern R. R.*, 42 N. H. 225) are comparable in ability to many which he subsequently wrote. As late as 1866 one of his ablest colleagues expressed the hope "that Doe might *yet* make himself a name as judge." The speaker was a warm admirer of Judge Doe, but realized the fact that he had not yet erected enduring monuments on the printed pages of the Reports. Had he left the bench at that time, the fame of his great judicial ability would have rested almost entirely on the traditions of his Trial Term work. His first contributions to the Reports which excited the general interest and commendation of the profession were his dissenting opinions in two cases in 47 N. H. (published in 1869): *Boardman* v. *Woodman*, 47 N. H. 140 and *Kendall* v. *Brownson*, 47 N. H. 196. After 48 N. H. he did his full share in filling up the volumes.

Any one who examines his work will discover that he had two very opposite methods of writing opinions; some of his opinions being among the most concise in the books, hardly containing more words than the head-note (indeed, in one instance, containing fewer words); while others are among the longest to be found in the Reports. The inquiry suggests itself: Why should a man, who had shown himself capable of writing such admirable short opinions, so often write extremely long ones? One reason is that he was in the minority in some of these cases, and was natur-

ally anxious to fully justify his dissent. See, for instance, besides the two cases in 47 N. H. already referred to, *State* v. *Pike*, 49 N. H. 408, *Hale* v. *Everett*, 53 N. H. 133, and *Orr* v. *Quimby*, 54 N. H. 603. There are also other cases where there was originally a division in the court, although that fact is not stated in the Reports. Thus in *Aldrich* v. *Wright*, 53 N. H. 398, popularly known as "The Mink case," a majority of his colleagues had in his absence decided the case the other way (*i. e.*, "other" from the result finally reached), and had announced their decision. The opinion of Judge Doe, which now appears in the book as the opinion of the whole court, was originally written to convince his brethren of their error, and had the desired effect. Again in *Lisbon* v. *Lyman*, 49 N. H. 553, though no dissent is expressed, yet the court were not in fact unanimous upon the last point, so elaborately discussed in the opinion, *pp.* 582–605.

But there is another reason for the unusual fulness of some of Judge Doe's opinions. He foresaw, and answered in advance, objections not yet raised. Like Pascal, he had foresight which revealed to him "objections unknown to his generation, and which inspired him with the idea of fortifying and intrenching positions which were not [yet] threatened."

A further reason for the length of some opinions may be found in the writer's unwillingness to adopt implicitly the statements and reasoning of other men. Even when he substantially concurred in results, he frequently preferred a new method of statement and a new process of reasoning. Right here, in my belief, is to be found some of the most valuable work which he has ever done. It was not enough for him that his predecessors had rejected erroneous conclusions. He insisted that the "negation of error" should not be based upon erroneous grounds. See, for example, an elaborate discussion covering thirty-three pages in *Orr* v. *Quimby*, 54 N. H. *p.* 605–638. "The obscurity of over-

elaboration" is a phrase once applied to one or more of Judge Doe's opinions by his warm friend and admirer, John M. Shirley. But that criticism is well founded in only a few instances. Undoubtedly, ideas are sometimes repeated, but the repetition is clothed in another form of words; the purpose being to reach different classes of readers through different forms of expression. And in these cases of repetition there will generally be found at the close a single forcible sentence summing up the whole discussion.

After making all deductions that can reasonably be claimed, the fact remains that no other judge has enriched the New Hampshire Reports with so many able opinions, and that some of these opinions compare favorably with the best that have been promulgated in other jurisdictions.

If this memoir were prepared for the especial use of persons who were strangers to his work, it might be desirable, at this point, to enumerate some of Judge Doe's most important opinions, and to give a few extracts showing his method of investigation and his judicial style. But it cannot be necessary to do this before an audience composed of New Hampshire lawyers, who are already familiar with these decisions.

You may be astonished to hear me say that these numerous printed pages do not represent the most valuable Law Term work of the late chief justice. Yet such is the fact. His most important work is not, and cannot be, represented in print. It consists of the services which he rendered in the consultation room. No complete estimate can be formed of the value of a judge's work except by those who know the part he played in the private deliberations of the court. Here, as elsewhere, Judge Doe was conspicuously useful, not only in bringing about right decisions but in preventing wrong ones. He seldom failed to discover instantly the vital point of each case, and could always give strong reasons for his conclusions. The celebrated jurist, John

Austin, once said of himself, that if he had any special intellectual vocation, it was that of untying knots. A similar claim might well have been made by Judge Doe. His colleagues can have no difficulty in recalling cases where he found a way for the court out of what seemed a hopeless labyrinth. One of his associates, who went upon the bench with a pretty strong prejudice against him, afterwards said that he had never seen any other man who could hew his way out of a difficulty so expeditiously and so neatly.

It was not the least of Judge Doe's merits in the consultation room that he had not that excessive pride of opinion which handicaps so many men. Before the statute of 1874, the judges were accustomed to sit at the law term in cases where their own trial term decisions came up for revision. Some rulings made by Judge Doe upon a certain trial in Coös county were subsequently overruled at the law term. The opinion was read by Judge Nesmith, and commented with unusual severity on the mistakes made at the trial. Mr. William Burns, the counsel whose exceptions were thus triumphantly sustained, hurried up to the bench and borrowed the manuscript of Judge Nesmith to gloat over it at his leisure. What was his astonishment at finding that every word of the opinion was in the well-known handwriting of Judge Doe! A difference with a colleague on a question of law was not regarded by Judge Doe as affording matter of personal grievance. With his radical tendencies, he was not unfrequently found differing from Chief Justice Bellows, who was an admirable specimen of the conservative lawyer of the old school. Yet the younger man regarded his older colleague with an almost filial affection. Judge Doe usually bore it with equanimity when he found himself in a present minority. He generally had faith to believe that his views would ultimately prevail, and this faith was not unfrequently justified by subsequent results. Some of his

most heretical dissenting opinions were finally pronounced orthodox. Perhaps the strongest instance, under all the circumstances, is the view which he expressed in his solitary dissent in *Boardman* v. *Woodman* and again in *State* v. *Pike*, as to the admissibility of the opinions of non-expert witnesses upon a question of sanity. This view, after being thrice rejected by a court of which he was himself a member, was finally adopted as law by a court from the membership of which he had been carefully excluded, *i. e.*, by the court which existed from 1874 to 1876. (See *Hardy* v. *Merrill*, 56 N. H. 227.)

The branch of law which, more than any other, he assisted in renovating and improving was the department of procedure. In most jurisdictions, reform in this respect has been left to the legislature: and their attempts have too largely resulted in substituting one set of technicalities for another, and in giving occasion for volume upon volume of Practice Reports. (See 53 Albany Law Journal, *pp.* 151, 152.) But the New Hampshire court, in Judge Doe's day, did not feel constrained to sit with folded hands, waiting for the legislature to enact a poorly-drawn code. Instead of this, the judges proceeded to simplify practice by their own decisions; not merely by discouraging formal objections, but by boldly declaring that "parties are entitled to the most just and convenient procedure that can be invented," and by distinctly recognizing "the judicial duty of allowing a convenient procedure as a necessary instrument of the administration of the law of rights." (See the very able opinions in *Metcalf* v. *Gilmore*, 59 N. H. *pp.* 431 to 435, and *Owen* v. *Weston*, 63 N. H. *pp.* 600 to 605.) The result is a flexibility of remedies in New Hampshire not surpassed by any of the so-called "Code States"; and, further, the absolute certainty that cases will be decided on their merits and that justice will not be "strangled in the net of form." It should not, however, be understood that these changes are owing solely to the efforts of Judge Doe.

Much credit is due to others: especially to Chief Justice Bell, who drew up the admirable "Rules for Regulating the Practice in Chancery," 38 N. H. 605–624; a work which Judge Doe said "constituted Judge Bell's monument." But, after making all due allowance to others, it remains undeniable that credit for the improvements in New Hampshire procedure is due more to Judge Doe than to any other one person. It was not merely what he gave utterance to as a Law Term judge. It was the general tone imparted to legal proceedings by his vigorous personality. To borrow a metaphor from a sketch of an eminent English judge, we may say that his presence in the court room was like a "healthy breeze in an overladen atmosphere." Judge Doe's mode of life and all his habits were democratic and simple in the extreme; and his love of simplicity led him, when presiding alone at *nisi prius*, to go far towards abolishing the mere forms and ceremonies which are usually observed in the court room. But there was no omission of any incident of procedure which was really essential to the rights of suitors.

When Judge Doe had been on the bench nearly fifteen years, a political overturn took place in New Hampshire: followed by the customary "remodelling" of the judiciary: *i. e.*, the legislative abolition of the existing court and the institution of a new court under a slightly different name, some of the members of the old tribunal being reappointed and others dropped. Nothing can be more absurd or pernicious than these so-called reorganizations of the court. Nominally, a New Hampshire judge is commissioned to serve "during good behavior," until he reaches the age of seventy. In reality, his appointment holds good until the next state election. The judicial tenure is less secure here than in those states where the office is directly elective; for in those jurisdictions the judge who has been chosen by popular vote is reasonably certain of being allowed to serve out the full term of years for which he was elected. It must not, how-

ever, be understood that the politicians who came into power in 1874 were sinners above all other men because they abolished the then existing court. On the contrary, they were simply following a bad precedent set by their political opponents. Indeed, the very court they were demolishing owed its birth nineteen years before to a similar abolition of a preceding tribunal. The example set by the congressional supporters of Jefferson in 1801, by the New Hampshire Federalists in 1813, and by the New Hampshire "Know Nothings" in 1855, was, unfortunately but not unnaturally, followed by the New Hampshire Democrats in 1874, and again by the New Hampshire Republicans in 1876. The theory that these last two reorganizations were designed solely to get rid of weak and inefficient members of the court is effectually disproved by the solemn fact that the Democrats, in 1874, failed to retain Charles Doe, and by the equally solemn fact that the Republicans, in 1876, failed to retain William S. Ladd.

Judge Doe made no complaint of the customary decapitation. On the contrary, he enjoyed the vacation thus afforded him. Upon his marriage, in 1865, to Edith Haven, daughter of George Wallis Haven, Esq., of Portsmouth, he had settled at the old family homestead in Rollinsford. He now spent two years of rest from court work at his pleasant home, giving much thought to the best methods of educating his children, spending a good deal of time among his trees, and incidentally making use of this leisure to bring up some arrears of reporting. Various attempts were made during the interval to engage his services as counsel and as referee; but they were all unsuccessful. He also declined to accede to the substantially unanimous desire of his political friends that he would accept a congressional nomination.

When the state "turned over again," in 1876, and a new court was established, the appointment of chief justice was tendered to Judge Doe without the slightest hesitation on

the part of the executive. But the offer was not accepted until after very great hesitation on the part of the recipient, who was reluctant to quit his pleasant home life. I was then on the invalid list, and completely out of practice. Hence Judge Doe came to me, as to one who was a disinterested witness, and put me through a very searching cross-examination as to the real reasons for the apparent desire that he should fill the office. He was willing to accept only in case he could be satisfied that he was really the first choice of the better element at the bar. He feared that the alleged desire of some lawyers for his appointment was due mainly to their dread of the selection of a still more unpopular person in the event of his declination. If he was wanted merely to keep out another man, he did not care to be used in that way. He distinctly remembered the days when he was *persona non grata* in certain sections, and it was difficult to persuade him that a very different sentiment towards him now prevailed. I called his attention to the fact that some of the bar leaders who formerly opposed him had now passed away; that others no longer occupied their former commanding position; and that still others (including some of the worthiest) had come to understand him better and now fully appreciated his services. But what I think made more impression upon him was my insistence upon the fact, that a new generation had come upon the stage during the seventeen years which had elapsed since his first appointment, and that the best of these younger lawyers were his warm friends and enthusiastic admirers. I remember asking him if he thought that a combination could now be successfully made to break up one of his terms in the county of A. if Mr. X should oppose it; or in the county of B, if Mr. Y should oppose it: X and Y being men who in 1859 were unfledged law students or inconspicuous juniors, but who in 1876 stood in the front rank and were among his hearty friends.

About two years after his return to the bench, an arrangement was made by his colleagues, whereby he was excused from the bulk of the Trial Term work in consideration of his giving extra time and attention to the Law Term business. The result has been that, though the chief justice was constantly engaged in his judicial labors, he was not so much before the public as heretofore, and hence many of the younger members of the bar have had but little personal knowledge of him.

One feature of his services as chief justice should be especially mentioned; and that is, the attempt to improve the style of reporting; an attempt which has borne good fruit, though resulting at times in delays which are much to be regretted. As is well known, the statements of facts and the head-notes in the New Hampshire reports have usually been prepared in each case by the judge delivering the opinion. (See Reporter's note, 49 N. H. *pp.* vii, viii.) This work in the earlier volumes was generally well done. But in 1850 (Laws, chap. 961, section 5), the legislature put a premium on judicial prolixity, by enacting that each judge, in addition to his regular salary, should also be paid for all matter furnished to the reports at a certain rate *per* each printed page. The more voluminous the report, the larger the compensation. This absurd provision was repealed in 1855 (Laws, chap. 1659, sections 33 and 36); but, meantime, the practice of lengthy reporting, though not adopted by all judges, had become common. Judge Doe began very early to shorten the voluminous statements of the reserved cases in making up his own contributions to the reports. And when he became the head of the court in 1876 he brought about a concert of action among the judges with a view to the preparation of concise statements and accurate head-notes, as well as a careful revision of opinions and an elimination of *dicta*.

For nearly twenty years, Judge Doe was the official head of the legal profession in New Hampshire. But he really

occupied a much higher position. By the general *consensus* of his contemporaries he was the foremost man of the profession in the state; foremost, not merely in name or in official position, but in fact. Many lawyers would undoubtedly be willing to make a much stronger statement. They would agree with me in saying, that, of all the men whom we have intimately known, not in the law only but in all walks of life, this man was the ablest.

If I were to sum up in a single sentence the cause of Judge Doe's intellectual superiority, I should ascribe it to the fact that he united in himself qualities of the highest order, which are so diverse that they are seldom found combined in one person. He had a remarkable memory, a quality which sometimes exists "in disproportion to other mental faculties." But no one would have said of him what Robert Lowe (Lord Sherbrooke) was wont to say of a certain great historian, that "his memory had swamped his mind." On the contrary, he had also a remarkable power of clear thinking. Again, he had extraordinary quickness of perception and facility of expression, qualities which are apt to be relied upon by their possessor to the exclusion of patient investigation. Yet Judge Doe, despite the astonishing rapidity of his mental operations, fully realized that in many instances nothing avails except industrious research; and there was no end to the amount of drudgery he would go through. One might say of him what Cecil is reported to have said of Sir Walter Raleigh, "I know that he can labor terribly."

Intellectually he was, above all things else, original. In a humorous sketch read by a bright young lawyer before a Bar Association, Doe, C. J. is represented as rendering a certain decision and giving as the sole reason "that the law has hitherto always been understood to be otherwise." This was, of course, a playful exaggeration; but it is true that the novelty of a proposition did not furnish to his mind a *prima facie* presumption against its adoption. As was

said of another, "he first looked at every question as if it were entirely a new one, and then allowed the judgments of the past to have due weight." Novelty had, undoubtedly, some charm for him, especially as to methods of reaching conclusions. He sometimes preferred to strike out a new path of his own "across lots," rather than go around by the beaten road. His one controlling desire in every case was to do exact justice, and if this end could not be accomplished save by setting at naught the so-called "wisdom of our ancestors," he did not hesitate to go to that extremity. He was not guilty of "that shrinking from responsibility" which Martineau justly stigmatizes as "the modern form of treason to the state."

It will surprise many persons to know that Judge Doe was not what would be called "a general reader." He was not in the habit of reading unless he had a special object. Whenever he was investigating a subject, he was indefatigable in research, and examined everything that could have an important bearing. Nor were his studies on such occasions confined to law books. For instance, when preparing his dissenting opinion in *Hale* v. *Everett*, 53 N. H. 133, he spent weeks, and probably months, in reading history and theology. But he never read for the mere sake of reading; nor did he make use of light literature as a mental rest or recreation. I believe it to be the fact that in his whole life he read only one novel, and not more than three other books outside of his special studies.

Socially, Judge Doe was one of the most delightful of men. He did not reserve himself for great occasions, but always abounded in good sayings. Few persons have ever spent an hour in his company without carrying away something to remember him by. He was not an overpowering talker, who did not know how to listen. Nor was he one of those who carefully prepare their bright remarks. On the contrary, the best things ever heard from him were in the nature of what Sydney Smith would have called "trump-

ing," *i. e.*, off-hand comments on, or replies to, remarks made by others. His fun answers the description recently given in the case of another distinguished judge: It was "spontaneous, apposite, and instantaneous." It should be added that, unlike some humorists, he could appreciate a joke of which he was himself the subject. I doubt whether any one enjoyed more than he the well-known story as to the advice given by an eminent lawyer to the examining committee of the Grafton bar; advice which (as Judge Doe himself said) so clearly marked the learned counsellor's utter contempt for the court. Judge Doe's strong sense of humor, though usually restrained upon the bench, crops out in the opinion in *DeLancey* v. *Ins. Co.*, 52 N. H. *pp.* 587 to 591. A few years ago, when the arguments and influence of the insurance companies seemed certain to defeat a bill pending in the Massachusetts legislature, a member rose, with the "Fifty-second New Hampshire" in his hand, and said that he should like to read to his colleagues the opinion expressed by the supreme court of New Hampshire relative to insurance companies. Before the reading had progressed far, the house was convulsed with laughter, and there was no further effective opposition to the passage of the bill.

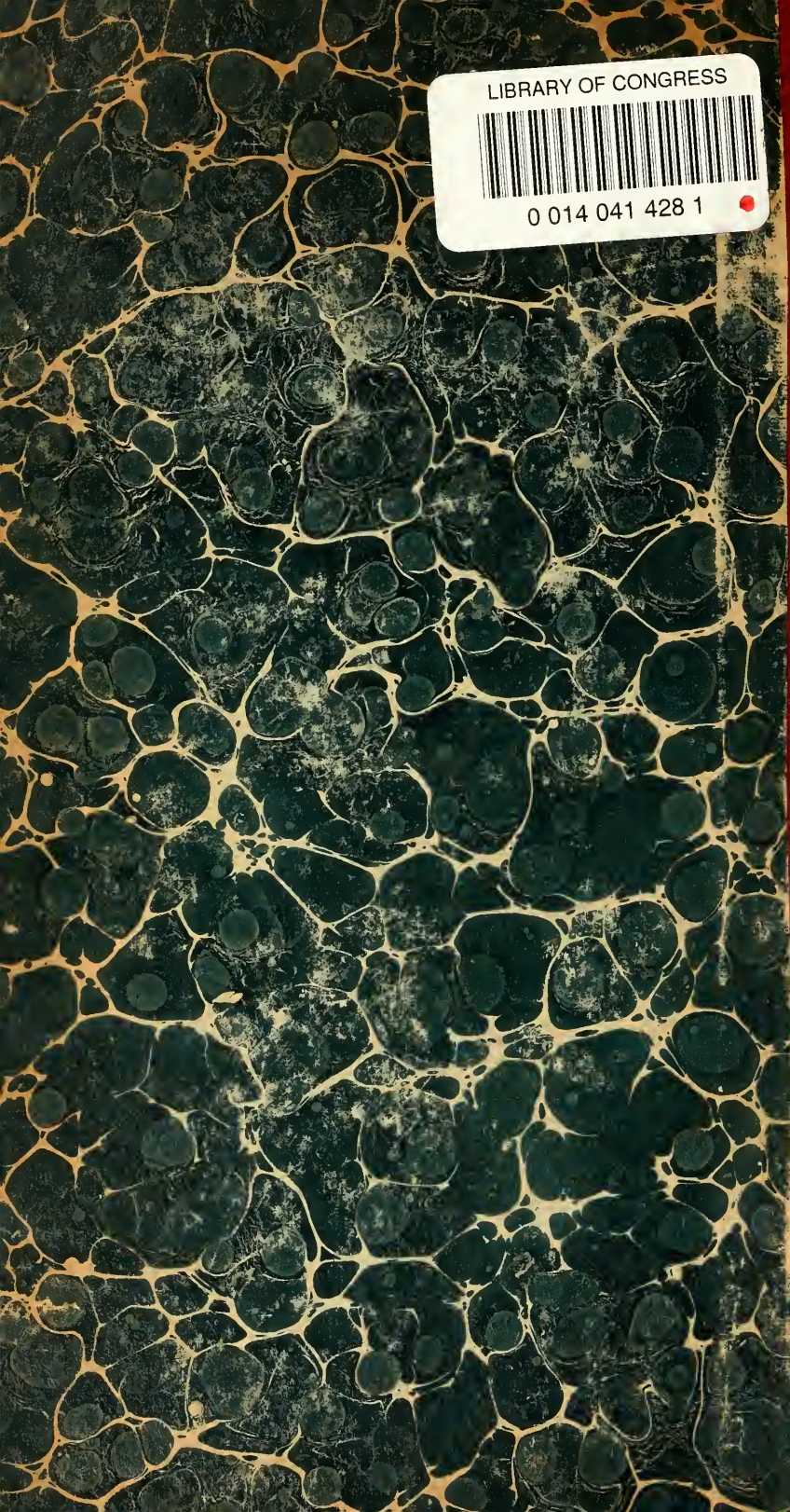
But there was one thing which Judge Doe's friends prized far more than his intellectual ability or his conversational power, and that was his kindness of heart. As was said of Lord Bowen: "Of unkindness he was as incapable as of stupidity." I do not believe that any of our legal brethren have ever done more kind acts than he, or done them in a more quiet way. I will not speak here of charities in his neighborhood, or of his sympathy and helpfulness in sickness (to which I can personally testify). But I think that special mention should be made in this presence of his helpfulness to the members of his own profession. He was the best friend I ever knew to law students, to young practitioners, and to older lawyers who

were on the point of assuming the unfamiliar duties of judicial position. His advice was always to the point, and given solely with a view to the good of the recipient.

Our friend had great charity for the failings of others. He could "put himself in the other man's place," and realize the obstacles in his path. I once made a sarcastic remark to him about the conduct of a man of generally high character, who seemed to be in one instance unduly influenced by personal friendship. His reply was simply: "Lord, lead *us* not into temptation."

Although Judge Doe's death took the bar by surprise, yet his health had been very precarious at several periods during his judicial career. In the first six years of his term, he had two long seasons of illness; and there were later occasions when he was obliged to desist from work for considerable intervals. He had naturally a strong constitution. The trouble was, that he could do nothing in moderation. The special task upon which he was engaged, whatever it was, always took complete possession of him, often occupying his mind by night almost as completely as by day. He suffered much from insomnia; and also underwent other physical ailments which nature is wont to inflict as penalties for overwork. His great mental powers remained unimpaired to the last moment of his life. He died suddenly, March 9, 1896, at the railroad station in Rollinsford, while on his way to the adjourned law term at Concord.

Twenty-three years earlier, his predecessor, Chief Justice Bellows, passed away suddenly at precisely the same period in the judicial year. What Judge Doe then said in regard to his friend may now, with a slight change, be applied to his own legal career: The lesson of his life is that of devotion to work.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